No. 13122

United States Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA and R. P. JANDL, as Administrator of the Estate of William F. Leland, Deceased, and C. W. BREAKIRON, Successor Receiver for Atlantic and Pacific Airlines,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LIMITED, ORION INSURANCE COMPANY, LIMITED, THE DRAKE INSURANCE COMPANY, LIMITED, subscribing underwriting members of Lloyd's, London,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' REPLY BRIEF

J. CHARLES DENNIS
United States Attorney.

HOUGHTON, CLUCK, COUGHLIN & HENRY,
Attorneys for R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, and C. W. Breakiron, as Successor Receiver for Atlantic and Pacific Airlines.

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CONDITIONS 1 AND 2 ARE NOT APPLICABLE

These two conditions of the policy were not mentioned by the District Judge in his opinion (R. 76-79) or in his findings of fact and conclusions of law (R. 89-93). We did not discuss them in our opening brief because we felt, as the trial judge apparently did, that they are so foreign to the issues as not to require mention.

Appellees refer to General Condition No. 1 which reads:

"(1) At the commencement of each flight the

> aircraft shall have a valid and current airworthiness certificate issued by the Civil Aeronautics Authority."

Appellees do not deny that the aircraft did have such a certificate at the commencement of the flight. What they contend is that overloading the plane "invalidated" the certificate (p. 33). We have submitted reasons why it is error to assume that there was overloading (Br. 46-49). Even if there had been overloading, it would have nothing whatever to do with invalidating the airworthiness certificate. This is issued as to "each newly-manufactured airplane" that meets published requirements as to type and design.

C.F.R. Sec. 4b.12.

No authority is cited to support the view that overloading would invalidate such a certificate. To argue that such a certificate is invalidated by overloading is on a par with arguing that a truck license is invalidated whenever the vehicle bearing it is overloaded.

Appellees also refer to General Condition No. 2, which reads:

> "(2) The aircraft shall be operated at all times in accordance with the operations authorized as set forth in the operations record of the aircraft."

It is not quoted correctly in appellees' brief (p. 30).

Is it not reasonable to expect that an insurer seeking to escape liability on an insurance policy because of a violation of some provision in an "operations record" would produce the "operations record" and point out explicitly what provision thereof is violated? Instead,

appellees refer to a form printed by the C.A.A. entitled "Operation Limitations" (Pls. Ex. 10, R. 440, Br. 32).

The policy does not say what is meant by "the operations authorized" or "the operations record of the aircraft." Since these expressions render the condition ambiguous and its meaning uncertain, the meaning most favorable to the insured must be applied, even though the insurer may have intended another meaning. Compare *Doke v. United Pac. Ins. Co.*, 15 Wn.(2d) 536, 544, 131 P.(2d) 436, 439.

It seems to us that "the operations authorized" means the operations authorized by the insurance policy, and that "the operations record of the aircraft" means the record of those operations kept by the airplane operator, *i.e.*, the operations log of the aircraft. The condition as a whole means that the aircraft will at all times be operated in accordance with the operations authorized by the policy and that the actual operations shall at all times accord with the record of them as kept in the log. The phrases "In accordance with the operations authorized" and "as set forth in the operations record of the aircraft" both modify "shall be operated at all times."

The insurance contract covers the airplane when operated for certain purposes and excludes coverage when it is used for others. See Section 8 (R. 43); General Exclusion 1-b and c (R. 44); Endorsement No. 3 (R. 39). This makes it important for the insurers to have available an accurate record of all operations. It is reasonable to assume that the purpose of General Condition 3 is to require the assured to operate the

plane in accordance with the operations authorized in the policy and put him on record as having done or not done so.

APPELLEES' CONSTRUCTION OF CONDITION 3 IS NOT TENABLE

Now we will take up the points discussed in our opening brief, consider appellees' answers or failure to answer and give reasons why their position seems to us untenable.

Our first proposition was that the purpose and effect of General Condition 3 is not to exclude coverage for assured's negligence but to prescribe certain duties of assured in event of damage. The first reason we gave in support of this proposition was that an interpretation excluding coverage for negligence would defeat the primary purpose of the policy (Br. 10).

In their answer appellees disregard the obvious, that the purpose of procuring insurance is ordinarily to secure protection against the consequences of negligence. This is a fundamental fact which courts have repeatedly stressed (our brief 19-20).

They likewise refuse to consider the policy as a whole. They confine their attention wholly to a few words taken in isolation.

They even disregard the point that the policy expressly covers damage caused by "frost," which includes icing (our brief 12).

We urged that if Condition 3 were construed as a covenant against negligent operation of the aircraft it would nullify Section I, the "Third Party Liability"

clause (12-14). Appellees shrink from this conclusion, knowing that they accepted $2,370.05 each year from the insured for this coverage.

Commenting upon the District Judge's denial of reimbursement to the plaintiff administrator for damage done to King County's revetment hangar, appellees state:

> "He could properly, and must have done so because of the assured's violation of General Conditions 1 and 2 * * *" (p. 41).

But we have seen that neither Condition 1 nor Condition 2 was violated, and the trial judge referred to neither in his opinion, findings of fact or conclusions of law. What he did was follow appellees' untenable construction of Condition 3 to its logical conclusion.

Appellees' position boils down to two propositions: (1) Condition 3 imposes a duty upon the assured at all times (pp. 37, 38) and is merely a positive way of saying he shall not be guilty of negligence (p. 48). (2) However, the policy insures against the claims of third parties irrespective of assured's negligence (pp. 41, 44).

These two propositions are inconsistent: If the words "due diligence" in Condition 3 are construed as a covenant against negligence in operating the aircraft, they nullify all third party liability coverage. This is so because (1) negligence in operating the airplane would void the policy (their brief 30), and (2) negligence in operating the airplane is the only thing that can give rise to third party liability.

Since appellees admit that it was not their intention that Condition 3 nullify third party coverage, it fol-

lows that they did not intend this condition to apply to negligence in the operation of the aircraft at all.

We submitted these related propositions: (1) Courts consistently effectuate intent and purpose of policy as gained from entire instrument; any ambiguity is resolved against insurer and absurdity avoided (pp. 14-17). (2) Conditions, exceptions and exclusions from coverage will be strictly construed against the insurer (pp. 17-19). (3) The language of Condition 3 is suited to requiring the assured to mitigate damage, but inept if its purpose is to exclude coverage for negligence in operating the aircraft (pp. 22-24).

Appellees answered this only by in effect splitting Condition 3 into two sentences (p. 37), quoting the words "due diligence" and the first clause of Condition 3 out of their context, as if they stood alone and were complete in themselves (pp. 18, 30, 35, 38, 41, 43, 48), and saying that the condition is "clear, plain and unambiguous and needs no construction" (pp. 18, 40, 43).

This disregards the principle (our brief 23) that words of general import (in the first clause of Condition 3) should be held to include only things similar in character to those specifically named (in the last clause of the condition).

Appellees say any other interpretation than the one they contend for renders the verb "avoid" in the first clause meaningless. We do not agree. We can see no reason why the assured could not, or should not, avoid loss of or damage to the aircraft and its equipment and

accessories, after the aircraft has sustained damage, by seeing that they are properly protected, guarded and cared for.

We submitted the proposition that the purpose and effect of General Condition 3 was to prescribe the duties of the assured with regard to mitigating loss or damage and ensuring the safety of the insured property in the event the aircraft is damaged (Br. 21-28).

We gave four reasons for this construction. The first was that with this meaning the condition serves a useful and practical purpose, protecting the interests of the insurer without forfeiting the rights of the assured (p. 21). Appellees' answer was that it was also useful to exclude negligence coverage (p. 47). They dress this up by saying that the purpose was to protect the insurer from "such wilful negligence and flagrant disregard of duty as was exhibited by the assured in this case" (p. 39). The policy makes no reference to wilful negligence or flagrant disregard of duty. If Condition 3 is a warranty against negligence in operating the aircraft it is a warranty against all such negligence, not merely wilful or flagrant negligence.

Appellees' answer to our second reason for the above construction, that the language is suited to that purpose but inept if given appellees' interpretation, was discussed above in connection with two related matters.

The third reason we gave was that the language relied upon to exclude insurance against negligence is in a part of the policy where it would not suggest that meaning to the assured (pp. 24-25).

Appellees' only answer to this is that the general conditions of the certificate are *on the same page* as the terms of the certificate and displayed as prominently thereon as any other part of the certificate. They ignore the fact that the words relied upon to emasculate or destroy the insurance coverage are part of a sentence buried in a section of the contract where one would not naturally look for language having that disastrous effect.

We also stated that appellees' construction of Condition 3 depends upon the location of one word "AND," and suggested a simple transposition (pp. 25-26).

Appellees' answer is that transposing the "AND" would amount to rewriting the contract and make the condition awkward, unnatural and in effect say the same thing twice (p. 47). We invite the court to compare the condition with this slight transposition (our brief 25-26) with the condition as it appears in the policy (our brief 7). Appellees ignore the rule (our brief 25) that in interpreting a contract words may be transposed to make the meaning clear and carry out the intent of the parties.

Appellees suggest that the premium would have been higher if they had not excluded negligence coverage (p. 44). There is no evidence of this in the policy or elsewhere. It is not standard practice (our brief 19). All other exclusions are carefully drawn and plainly labeled. If appellees actually based their premium on excluding negligence coverage is it reasonable that they would word that important exclusion so obscurely and put it in such an inappropriate place in the contract?

APPELLEES' AUTHORITIES ARE NOT PERTINENT

Appellees cite 11 cases holding that losses caused by the assured's negligence or lack of due care or diligence were not covered by the policies. These cases are *Isaacson Iron Works v. Ocean Acc., etc., Corp.,* 191 Wash. 221, 70 P.(2d) 1026; *Shoshone Concentrating Co. v. Hamburg-Bremen Fire Ins. Co.,* 64 Wash. 638, 117 Pac. 500; *Richelieu & O. Nav. Co. v. Boston M. Ins. Co.,* 136 U.S. 408, 10 S.Ct. 934, 34 L.ed. 398; *Chicago S.S. Lines v. U.S. Lloyds,* 12 F.(2d) 733 (cert. denied in 273 U.S. 698, 47 S.Ct. 94, 71 L.ed. 846); *Leatham Smith-Putnam Nav. Co. v. National U. F. Ins. Co.,* 96 (F.(2d) 923; *Western Assur. Co. v. Shaw,* 11 F.(2d) 495; *Garcelon v. Comm. Travelers' Eastern Acci. Asso.,* 195 Mass. 531, 81 N.E. 201; *Morris v. Comm. Travelers' Eastern Acci. Asso.,* 98 N.E. 599; *Nichols v. Comm. Travelers' Eastern Acci. Asso.,* 109 N.E. 449; *Manter v. Boston Fire Ins. Co.* (N.H.) 35 Atl.(2d) 196; *Standard Life & Acc. Ins. Co. v. Jones,* 10 So. 530.

One need only read appellees' quotations (pp. 19-29) to see that all those cases are clearly distinguishable from this one on the same fundamental ground. In each of them the policy contained an express provision requiring due care or diligence or excluding liability for negligence *in doing the thing that caused the loss.*

We have seen that while Condition 3 of our policy required the assured to use due diligence, it did not require him to use due diligence in operating the airplane, which was the act that caused the loss. It only required him to use due diligence to avoid or diminish loss or damage to the insured property in the event of

the aircraft sustaining damage covered by the policy. A similar distinction was considered in *Rogers v. Aetna Ins. Co.,* 95 Fed. 103; Appellants' Br. 26.

Appellees cite 17 cases to support their statement that "A breach of a condition material to the risk avoids a policy of insurance" (pp. 33-35).

These cases are *Shoshone Concentrating Co. v. Hamburg-Bremen Fire Ins. Co.,* 64 Wash. 638, 117 Pac. 500; *Smith Lumber Co. v. Netherlands F. & L. Ins. Co.,* 135 Wash. 547, 238 Pac. 565; *Johnson v. Franklin Ins. Co.,* 90 Wash. 631, 156 Pac. 567; *Henslin v. H. S. Fire Ins. Co.,* 152 Wash. 637, 278 Pac. 702; *Ferguson v. Lumbermen's Ins. Co.,* 45 Wash. 209, 88 Pac. 128; *Clark v. Western Ins. Co.,* 168 Wash. 366, 12 P.(2d) 408; *Canton Ins. Off. v. Independent Trans. Co.,* 217 Fed. 213; *Georgian, etc. v. Glenn Falls Ins. Co.,* 21 Wn.(2d) 470, 151 P.(2d) 598; *Johnson v. Inland Empire, etc., Ins. Co.,* 155 Wash. 6, 283 Pac. 177; *Brehm Lbr. Co. v. Svea Ins. Co.,* 36 Wash. 520, 79 Pac. 34; *Kentucky-Vermilion Mining & Concentrating Co. v. Norwich Union Fire Ins. Society,* 146 Fed. 695; *Imperial Fire Ins. Co. v. Coos County,* 151 U.S. 452, 14 Sup. Ct. 379, 38 L. ed. 231; *Richardson v. Superior Fire Ins. Co.,* 192 Wash. 553, 74 P.(2d) 192; *Delaware Ins. Co. of Philadelphia v. Greer,* 120 Fed. 916, 57 C.C.A. 188, 61 L.R.A. 137; *Menger v. Inland Empire Ins. Co.,* 118 Wash. 514, 203 Pac. 934; *McKernan v. North River Ins. Co.,* 206 Fed. 984; *Neil Bros. Grain Co. v. Hartford Fire Ins. Co.,* 1 F.(2d) 904.

Not one of those cases sustains appellees' broad, general statement. The most any of them holds is that

breach of such a condition voids a policy *if the policy provides in express terms that the breach shall have that effect.* Every one of them contained a provision that the property was insured only while a certain state of facts existed or that the policy would be void if a specified state of facts existed or ceased to exist or if an express warranty or condition was violated.

The policy in this case contains no such provision with regard to either of the three general conditions upon which appellees rely. The only general condition containing such a provision is No. 9 (R. 44). This indicates that the others were not intended to have that effect. *Expressio unius est exclusio alterius.*

Port Blakely Mill Co. v. Springfield Etc. Ins. Co., 59 Wash. 501, 511-513; 110 Pac. 36, 40-41.

Of course what we have said in disposing of appellees' other citations applies equally to these. Even if it were admitted that there was lack of due diligence in operating the aircraft, that would not violate a condition of the policy, because the requirement of due care does not apply to such operation.

Appellees cite *McCoy v. Courtney,* 25 Wn.(2d), 956, 172 P.(2d) 596, holding that violation of law is negligence *per se.* We will show elsewhere that if there was any such violation it was not a cause of the accident. Even if it were otherwise it would be immaterial because the only negligence possible was in operating the aircraft and such negligence is not a defense. Compare *Central Manufacturers' Mut. Ins. Co. v. Elliott,* 177 F. (2d) 1011.

Appellees' quotations from 29 Am. Jur. 714 and 29

A.L.R. 714 (pp. 18-19) and the two Harter Act cases (p. 29) merely define the measure of due care when required by a policy or statute. They have no application here because the policy did not require due care in doing the thing that caused the loss, *i.e.,* operating the airplane.

Appellees cite *Isaacson Iron Works v. Ocean Acc., etc., Corp.,* 191 Wash. 221, 70 P.(2d) 1026, and *Richelieu & O., Nav. Co. v. Boston M. Ins. Co.,* 136 U.S. 408, 10 S.Ct.. 934, 34 L.ed. 398, on the point that an assured has the burden of proving he has sustained a loss within the terms and conditions of the policy (p. 49). Appellants sustained that burden. The loss, which was admitted, was unquestionably covered by the insuring clauses of the policy. If appellees mean that appellants had the burden of proving that the assured used due diligence in operating the aircraft, the answers, in addition to the basic one that negligence in operating the plane is not a defense, are: (1) Negligence is an affirmative defense and the burden is upon the one asserting it. (2) Appellees having with appellants' approval assumed the burden, will be held to that position on appeal.

> *Kentucky-Vermilion Mining & Concentrating Co. v. Norwich Union Fire Ins. Society* (C.C.A. 9) 146 Fed. 695.

In that case this court said:

> "The general rule is that a party who, with the acquiescence of his adversary, assumes the burden of proof of an issue will be held to that position on appeal."—*ibid,* 702.

> "The burden is, of course, upon the insurer to

establish that insured's conduct was such as to come within the provisions of the contract excepting or limiting liability."—29 A.L.R. 715 (IV).

APPELLEES' POSITION IS NOT SUSTAINED BY THE EVIDENCE (Appellants' Br. 28-56)

At p. 36, appellees "caution the court to look to the record," saying we have made quotations "out of context" and argument "not borne out by the record." Elsewhere they charge "distortion" (53) and other unkind things. We have rechecked all record references in our opening brief, and invite the court to do so. What arouses appellee's complaints really is any attempt to separate wheat from chaff in the testimony of their witnesses.

Under a heading in our opening brief to the effect that the insurers tried but failed to establish the cause of the crash, we emphasized that the left turn of the plane off the runway is the unique feature of the accident requiring explanation (32-33). Appellees in effect agree, except they insist that the plane went off the runway with a gentle curve (51-52); we shall not quibble over these words.

Under four related headings we urged that the testimony of Mr. Vineyard, appellees' principal witness, amounted to the theory that there had been more ice on the left than upon the right wing, causing the left wing to stall and the plane to turn left off the runway (33-40). Appellees offer no direct answer to the analysis given, but quibble over detail.

Appellees really confirm our contention that Mr.

Vineyard finally renounced icing as a cause of the crash (our br. 35-37). They say:

> "He stated right from the start that he did not examine the upper surface of the right wing and did not know how much ice was upon it. He did testify as an expert (R. 320) that *if* an airplane took off *with more ice on one wing than the other* that the one that had more ice on it would stall sooner than the other" (Appellees' Br. 54; italics ours).

Since this same witness had testified that *the icing condition on the bottom of both wings was the same* (Appellants' Br. 37), his testimony comes down to this: I don't know whether there was more ice on the upper side of the left wing than on the upper side of the right wing, but if there was, the stalling of the left wing and plane's left turn off the runway might be explained on that ground.

The "Testimony of Messrs. Miner and Flood as to Presence of Ice" was analyzed in our opening brief (40-41). Appellees assert that "Mr. Flood advised the assured, Leland, that he did not think the plane was in a safe condition to fly * * *" (p. 8). They charge that we "dispose of the expert testimony of Emmett Flood by an out of context quotation" (p. 57). We view such statements as smoke-screen laid over the point that Mr. Flood did not see the airplane at all after Mr. Miner's removal of ice from it (Appellants' Br. 40-41).

We analyzed the testimony of Professor Ganzer and Mr. Merrill under the heading "Remaining Opinion Testimony of Defendants as to Effect of Ice on an Airplane" (41-46). Appellees at p. 57 refer to the testi-

mony of Professor Ganzer, but add nothing to meet the point that his testimony is purely hypothetical (Appellants' Br. 42-43). As to Mr. Merrill's testimony, appellees again quibble on details (p. 58), but do not answer directly our analysis of it (Appellants' Br. 44-47). Appellees are silent on the point that Mr. Merrill testified that icing would not cause the left turn of the plane off the runway unless it is assumed, as the evidence does not show, that there was appreciably more ice on the left than on the right wing (Ibid. 46).

Appellees (9-11) refer to testimony of four student passengers on icing. They testified by deposition, with no cross examination. Yet not one of them bears out appellees' contention that there was more ice on the left wing than on the right (R. 382, 391, 398, 402).

At pages 46 to 49 we urged that "There was no Proof that There was any Overloading." We anticipated the argument offered by appellees on this point; yet they make scant if any answer. As we pointed out, the plane carried no more than the permitted number of passengers so that appellees' theory of overloading depends primarily upon proof of the weight of (1) fuel and (2) baggage on the plane. They set forth their material in a way best calculated to create an illusion of certainty (11-14), going so far as to say: (12)

> "The undisputed evidence shows that there were 600 gallons of gasoline on board at the time of the attempted takeoff (R. 22-54-329-333). Computed as prescribed by regulation, this weighed 3600 *pounds.*"

A check of the record cited shows the complete unsoundness of their position. The only relevant portion

of pages 22-54 amounts to a statement made by appellants, in response to a request for admissions, that they could *not* affirm or deny the number of gallons on the airplane because all operating personnel who knew anything about it had been killed. Pages 329-333 relate to the testimony of Mr. Vineyard in which the opinion is expressed that Mr. Chavers would have carried 600 gallons on the flight if he stated his intention of so doing in the flight plan filed a few hours earlier. Appellees fail to comment on the complete inadequacy of this testimony pointed out in our opening brief (47-48). Nor do they refer to the fact, previously mentioned, that this same witness conceded that he did not have any basis for "any honest, reliable judgment that there was any overloading" (*Ibid.* 48).

It is obvious, then, that there is no basis for appellees' claim that the gasoline "weighed 3,600 pounds."

Nor have they any more cogent evidence as to the weight of the baggage. They refer to two student-passengers who helped load a part but not all of it and who did not weigh any of it (12-13). They then refer to the opinion testimony of a third student, Mr. Kendall. We have referred to his testimony, which amounts to an opinion as to the weight of unknown contents of baggage which he had neither lifted nor weighed (48-49).

In our opening brief it was urged that "There was no Evidence that Fog Caused the Accident" (49-52). As if they really did not have confidence in icing as the cause, appellees refer to the left turn of the plane off the runway and then say: "One must inevitably conclude, as the District Court apparently did, that the pilot couldn't see where he was going" (52-53). They

repeat this view at pp. 59, 61. The District Judge, however, never even "apparently" found that fog caused the crash. His findings relate to icing and do not mention fog (R. 89-93).

They then say it would not have been necessary to introduce opinion testimony on this matter, since any layman could conclude it was because of fog that the plane adopted a heading left off the runway after its first 800 feet of run (59). We have shown that a layman would conclude the opposite (Br. 49-50). Furthermore, appellees did call expert witnesses, whether it was necessary for them to do so or not. These witnesses in testifying that the cause was icing, "possibly" overloading (Vineyard) and taking the airplane off before it had acquired flying speed (Merrill) by inference ruled out fog.

Appellees do not comment upon the undisputed testimony that an instrument takeoff, without visual reference at all to outside objects, is safe, and that Mr. Chavers was certified for this type of takeoff (our brief 51-52).

Appellees' position on this point is inconsistent with the report of the Civil Aeronautics Board, which appellees say that the District Court should have admitted in evidence (Br. 62). On the matter of fog this report stated:

> "It is also possible that the pilot did not have sufficient visibility to hold the airplane on the straight course; *however, his pilot experience included a reasonable amount of training, and in view of this it can be reasonably expected that he would be able to continue to takeoff successfully by refer-*

ence to instruments if all outside visible reference were lost'' (R. 303-304; italics ours).

We pointed out in our opening brief that ''Any Findings of Negligence Must Be Based Upon *'Res Ipsa Loquitur' ''* (Br. 54-56). The decision of the Superior Court of King County was referred to wherein the court stated that ''whether the swerving of the plane was due to ice upon the wings is in my opinion speculative'' (Br. 55). Appellees counter by saying that this decision should not have been received in evidence, without meeting the point that the opinion and other portions of the court's record in the suit brought by King County for damage to its revetment hangar were pertinent to appellants' claim under its third party liability clause.

Appellees then say that the report of the Civil Aeronautics Board (Def's. Ex. A-13, R. 293-308) should have been received in evidence (62). The trial court's ruling on this was correct, by virtue of the express provisions of 49 U.S.C.A., Section 581. It is undisputed that at the hearing pursuant to which the report was prepared counsel for appellants were denied the privilege both of direct and cross-examination, being permitted only to hand up questions to the hearings' officer who might ask them or not as he saw fit (R. 312). Even apart from the statute cited, the report would be hearsay. 153 A.L.R. 163, 166 *et seq.*. ''Admissibility of report of public officer or employee on cause of or responsibility for injury to person or damage to property.''

We submitted that the trial court erred in excluding evidence and rejecting plaintiffs' offer of proof relating to weather and air traffic conditions (Br. 56-60). Appel-

lees in answering this argument (63-67) do not meet the central point, that the evidence was excluded even while the trial court held it to be material, for the sole reason that it was not proper rebuttal. Appellees submit no reason why it was not proper rebuttal. That the offer of proof should have been received is apparent from reading it (Appellants' Br. 58-60). This offer of proof included the point that at the moment before take-off the pilot reported he could see the green lights at the opposite end of the runway, 5000 or more feet away, and that the control tower then cleared him for take-off (Appellants' Br. 59-60).

It is respectfully submitted that the judgment of the District Court should be reversed with direction that plaintiff have judgment for the amounts asked in the amended complaint, including interest at 6% from date of loss and costs. What the amount of this judgment should be is analyzed at pages 60 to 62 of our opening brief. Appellees have taken no exception to the computation therein set forth.

Respectfully submitted,

J. Charles Dennis
United States Attorney.

Houghton, Cluck, Coughlin & Henry,
Attorneys for R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, and C. W. Breakiron, as Successor Receiver for Atlantic and Pacific Airlines.